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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARTIN NORMILE,

Plaintiff and Appellant,

v.

GREEN TREE SERVICING, LLC,

Defendant and Respondent.

B216836

(Los Angeles County
Super. Ct. No. BC401134)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Richard L. Fruin, Jr., Judge. Affirmed.

Dennis Moore and Walter Hackett for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, John D. Sullivan and Chaise R. Bivin for
Defendant and Respondent.

* * * * *

Appellant Martin Normile defaulted on a home loan and respondent Green Tree Servicing, LLC acquired the property at a trustee's foreclosure sale. Green Tree then initiated an unlawful detainer action against Normile. A few weeks later, Normile filed this action against Green Tree alleging 16 causes of action, including fraud, quiet title, and to set aside as void the deed of trust and the trustee's sale. The two actions proceeded simultaneously. The trial court in the instant case sustained Green Tree's demurrer to the complaint without leave to amend. Thereafter, in the unlawful detainer case, judgment was entered in favor of Green Tree. In this appeal, Normile abandons most of his alleged causes of action, and contends that he should be given leave to amend five causes of action against Green Tree, all of which attack the validity of the foreclosure sale and Green Tree's title. Because we determine that the unlawful detainer judgment conclusively established that Green Title had title and lawful possession, we find that Normile's proposed amended causes of action are barred by collateral estoppel and that any amendment at this point would be futile. We therefore affirm the trial court's ruling sustaining the demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law.

(Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In September 2006, Normile purchased a single-family residence in Lancaster. He obtained a loan in the amount of \$276,000 from WMC Mortgage Corp. (WMC), which secured the loan by a deed of trust recorded against the property. This first deed of trust identifies WMC as the lender, Westwood Associates as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, "acting solely as a nominee for Lender and Lender's successors and assigns." The deed of trust gives the beneficiary the right to foreclose and sell the property.

In October 2006, Normile obtained a second loan from WMC in the amount of \$67,855.60, which was secured by a second deed of trust recorded against the property. A substitution of trustee was recorded on June 18, 2007, substituting ReconTrust Company, N.A. as the trustee of the first deed of trust in place of Westwood Associates.

Within five months of purchasing the property, Normile defaulted on the loans and ReconTrust recorded a notice of default on March 12, 2007. On June 13, 2007, ReconTrust recorded a notice of trustee's sale, which set the trustee's sale for July 5, 2007. The trustee's public auction was actually held almost a year later on May 23, 2008, and Green Tree purchased the property for \$141,029.91 as the highest bidder. On July 3, 2008, a trustee's deed upon sale was recorded, which identified Green Tree as both the grantee and the beneficiary of the first deed of trust.

Also on July 3, 2008, an assignment of deed of trust was recorded, providing notice that MERS had assigned its interest as a beneficiary of the first deed of trust to Green Tree. Although the assignment and the trustee's deed upon sale were both recorded on the same date, it appears that the assignment was recorded first, based on its instrument number of 20081189940; the trustee's deed upon sale bears the instrument number of 20081189941.

The unlawful detainer case

On or about October 15, 2008, Green Tree filed an unlawful detainer complaint against Normile. Normile filed an answer to the complaint, denying the material allegations and asserting as affirmative defenses that he had possession and title to the property. The answer also stated that Normile would file a lawsuit alleging causes of action such as fraud, quiet title, slander of title and declaratory and injunctive relief.

On July 6, 2009, Green Tree moved for summary judgment in the unlawful detainer action. Green Tree asserted that it was entitled to possession of the property and had duly perfected its title to the property. On July 14, 2009, after "full consideration of the evidence, and the written and oral submissions by the parties," the court found no triable issues of material fact and issued an order granting Green Tree's motion for

summary judgment. The court found that Green Tree had “purchased the subject property . . . at a Trustee’s Sale held in accordance with Civil Code section 2924 under a power of sale contained in a Deed of Trust executed by Martin Normile,” and that “[t]itle to the Property has been perfected in [Green Tree] by the recording of a Trustee’s Deed Upon Sale in the Official Records of the County of Los Angeles.” Judgment was entered in the unlawful detainer action on July 14, 2009, awarding possession of the property to Green Tree.¹

The instant case

On November 3, 2008, while the unlawful detainer action was pending, Normile filed the instant action against Green Tree. After Green Tree demurred, Normile filed a first amended complaint alleging 16 causes of action against Green Tree. Green Tree demurred again and Normile opposed the demurrer. On April 29, 2009, the trial court sustained Green Tree’s demurrer as to all causes of action without leave to amend, finding that the “allegations in the FAC as to Green Tree are wholly insufficient to attribute liability against Green Tree,” and that each cause of action failed to state facts sufficient to constitute a cause of action. On June 10, 2009, Normile filed a notice of appeal in this case.

Thereafter, Green Tree transferred the property to Lehman Capital Inc., as reflected in a grant deed recorded on January 22, 2010. Lehman Capital Inc. then transferred the property to a third party purchaser, Giora Bar, as reflected by a grant deed recorded on February 1, 2010.

¹ We granted both parties’ requests to take judicial notice. With respect to the unlawful detainer action, Green Tree included in its request copies of the complaint, answer, motion for summary judgment and supporting exhibits (including the deeds of trust, the trustee’s deed upon sale, the notice to vacate and declarations), the undisputed separate statement of facts, the order and the judgment.

DISCUSSION

I. Standard of Review.

We review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether the complaint alleges sufficient facts to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.) "On appeal, we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.)

We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan, supra*, at p. 318; *Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126.) A request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.) "[H]owever, leave to amend should *not* be granted where, in all probability, amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.) Leave to amend should be denied where no liability exists under substantive law. (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1141; *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 489.)

II. Normile's Proposed Causes of Action are Barred by Collateral Estoppel.

Normile's sole contention on appeal is that the trial court abused its discretion in denying him leave to amend his first amended complaint. He argues that he can plead

facts sufficient to state five causes of action against Green Tree to “Void and Cancel the Assignment, Void and Cancel the Deed of Trust, Quiet Title, Set-Aside the Trustee’s Sale, and to Void and Cancel the Trustee’s Deed Upon Sale.”² He claims he can plead facts showing that an improper party (Green Tree) conducted the foreclosure sale because there was no recordation before the sale evidencing that Green Tree was the substituted beneficiary instead of MERS. He asserts that these facts make the sale void and therefore Green Tree acquired no title through the sale. In essence, Normile is claiming that he should still be allowed to attack and unwind the foreclosure sale by which Green Tree acquired the property nearly three years ago and after which Normile has lived in the property payment free for approximately three years. We disagree.

We determine that Normile is collaterally estopped from challenging the foreclosure sale under the causes of action at issue in this appeal because the unlawful detainer judgment in favor of Green Tree conclusively established that Green Tree lawfully had possession of the property and that it perfected its title to the property, i.e., that the foreclosure was properly conducted pursuant to Civil Code section 2924 et seq.

“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” (*San Remo Hotel, L.P. v. City & County of San Francisco* (2005) 545 U.S. 323, 336. fn. 16; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813.) “The purposes of the doctrine are said to be “to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation.” [Citation.]” (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.)

² Normile does not challenge the trial court’s ruling as to the 11 other causes of action against Green Tree: (1) slander of title, (2) fraud (misrepresentation), (3) fraud (concealment), (4) conspiracy to commit fraud, (5) to void contract, (6) breach of fiduciary duty, (7) violation of Business and Professions Code section 17200, (8) intentional infliction of emotional distress, (9) declaratory relief, (10) violation of Civil Code section 2923.5, and (11) restitution.

Our Supreme Court has recognized the potential of an unlawful detainer judgment to collaterally estop subsequent litigation: “Applying the traditional rule that a judgment rendered by a court of competent jurisdiction is conclusive as to any issues necessarily determined in that action, the courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee’s sale are barred by the prior unlawful detainer judgment.” (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 256.)

“The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]” (*Syufy Enterprises v. City of Oakland, supra*, 104 Cal.App.4th at p. 878.)

Before we address these requirements, we note that the unlawful detainer action and this instant action proceeded below simultaneously, and that the unlawful detainer judgment was entered after the trial court in this action sustained the demurrer without leave to amend. Because the unlawful detainer judgment had not been issued at the time the trial court ruled on Green Tree’s demurrer, the issue of collateral estoppel was not raised below. Instead, the parties’ arguments below centered largely on Normile’s claims of fraud, which the trial court found implicated the originating lender and had nothing to do with Green Tree. The trial court also found that the five causes of action now at issue in this appeal failed to state facts sufficient to constitute causes of action.

Nevertheless, the preclusive effect of the unlawful detainer judgment has now become an issue. Because the doctrine of collateral estoppel precludes Normile from relitigating issues which have been judicially determined against him, we deny Normile’s request that he be granted leave to amend. Any such amendment as he proposes would be futile.

Turning to the requirements of collateral estoppel, the requirements are met here: (1) The unlawful detainer action determined that Green Tree was entitled to judgment because Green Tree established that it was entitled to possession of the property and had

duly perfected its title to the property, issues identical to those being sought to be litigated here; (2) The unlawful detainer judgment is final because Normile's time for appeal has passed (see *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974); and (3) Normile was a party to the unlawful detainer action.

The fundamental issue in an unlawful detainer proceeding is the plaintiff's right to possession. (See *Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 465.) But where, as here, the unlawful detainer action is brought pursuant to Code of Civil Procedure section 1161a, subdivision (b)(3), *title* is also an issue. This section provides that an unlawful detainer action may be filed "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected." (Civ. Code, § 1161a, subd. (b)(3).) "Indeed, because the sole basis upon which [Green Tree] asserted its right to possession of the property was its 'duly perfected' legal title obtained in the nonjudicial foreclosure sale, the validity of [Green Tree's] title *had* to be resolved in the unlawful detainer action." (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 974 (*Malkoskie*).)

Malkoskie is instructive. There, the homeowners refinanced with a loan from Home Loans USA, Inc. The deed of trust identified Home Loans as the beneficiary and Premier Trust Deed Services as the trustee. Later, a substitution was recorded evidencing Alliance Title Company as the new trustee as designated by Option One Mortgage Corporation. But there was no recorded substitution showing Option One as the new beneficiary of record with the authority to designate a substituted trustee. (*Malkoskie, supra*, 188 Cal.App.4th at p. 971.) At a nonjudicial foreclosure sale, Wells Fargo acquired the property on a credit bid. Two months later a substitution was recorded acknowledging assignment of the deed of trust to Option One as the new beneficiary and another substitution was recorded evidencing the assignment of beneficiary status from Option One to Wells Fargo. (*Id.* at pp. 971–972.) The deed from the foreclosure sale documenting the purchase by Wells Fargo was recorded the same day. Wells Fargo then instituted an unlawful detainer action under Code of Civil Procedure section 1161a, in

which the homeowners raised the affirmative defenses that the nonjudicial foreclosure sale was invalid due to improper notice and other unspecified “irregularities in the sale.” (*Malkoskie, supra*, at p. 972.) At the time of trial, the parties agreed to entry of a stipulated judgment in favor of Wells Fargo, and the homeowners were forcibly evicted. (*Ibid.*)

The homeowners then filed a lawsuit against Wells Fargo and others attacking the authority of the defendants to foreclose, including the claim that the sale was conducted by an improper trustee and therefore no valid title passed to Wells Fargo. Like Normile’s first amended complaint, the homeowners alleged causes of action including quiet title, cancellation of trustee’s deed, wrongful foreclosure, and declaratory relief. (*Malkoskie, supra*, 188 Cal.App.4th at p. 972.) The homeowners contended that “the issue of the improper trustee conducting the sale was not embraced by or otherwise resolved by the stipulated judgment such that there is no bar to plaintiffs’ claims seeking to undo the foreclosure sale as invalid.” (*Id.* at p. 973.) The *Malkoskie* court disagreed: “By stipulating to judgment against them, plaintiffs conceded the validity of Wells Fargo’s allegations that the sale had been duly conducted and operated to transfer ‘duly perfected’ legal title to the property. “‘Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt . . . [citation], which includes good record title [citation] . . . [.]’ [Citation.]’” (*Id.* at p. 975.)

Like Wells Fargo, Green Tree filed its unlawful detainer action against Normile pursuant to Code of Civil Procedure section 1161a. And, like Wells Fargo, Green Tree “alleged in its complaint the specific facts it contended established it had perfected legal title to the property, including that the foreclosure sale was conducted in accordance with Civil Code section 2924.” (*Malkoskie, supra*, 188 Cal.App.4th at p. 974.) In his answer, Normile denied the allegations and raised the affirmative defenses that he had rightful possession of and title to the property. Under these circumstances, “[t]he conduct of the sale and the validity of the resulting transfer of title to [Green Tree] were therefore directly in issue in the unlawful detainer case.” (*Ibid.*)

While there was no stipulated judgment between Normile and Green Tree in the unlawful detainer action, Normile, like the homeowners in *Malkoskie*, challenges in this action the conduct of the foreclosure sale and the validity of the resulting transfer of title to Green Tree. There is no suggestion in the *Malkoskie* opinion that the particular findings that the proper parties conducted the foreclosure sale or that Wells Fargo had valid title were expressly included in the parties' stipulated judgment. The *Malkoskie* court concluded that the homeowners' specific "consent to judgment conclusively determined the specific factual contentions embraced by the complaint, namely that Wells Fargo had obtained valid record title pursuant to a nonjudicial foreclosure sale that had been duly conducted pursuant to statute." (*Malkoskie, supra*, 188 Cal.App.4th at p. 975.)

The unlawful detainer judgment in favor of Green Tree established that Green Tree had "purchased the Property at a Trustee's Sale held in accordance with Civil Code section 2924 under a power of sale contained in a Deed of Trust executed by [Martin Normile]," and that "[t]itle to the Property has been perfected in [Green Tree] by the recording of a Trustee's Deed Upon Sale in the Official Records of the County of Los Angeles." Because each of Normile's five claims against Green Tree at issue in this appeal is premised on the alleged invalidity of the foreclosure sale, we find that appellant is collaterally estopped from asserting any of these claims in an amended complaint. The issues were finally determined and are established as a matter of law. Because leave to amend under these circumstances would be futile, we find that the demurrer was properly sustained without leave to amend. (*Vaillette v. Fireman's Fund Ins. Co., supra*, 18 Cal.App.4th at p. 685.)

DISPOSITION

The judgment is affirmed. Green Tree is entitled to recover its costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ